JAN 6 19
CHARLES E

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.
No. 171.

HENRY C. HILL, Warden, United States Northeastern Penitentiary,

Petitioner,

v.

UNITED STATES, *ex rel.* JOSEPH WEINER.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

RESPONDENT'S BRIEF.

SAMUEL H. KAUFMAN,
Attorney for Respondent.

SETH W. RICHARDSON,
SAMUEL H. KAUFMAN,
EUGENE M. PARTER.
Of Counsel.

INDEX

PAGE

Opinions Below 1

Jurisdiction 2

Questions Presented 2

Statutes Involved 2

Statement 3

Summary of Argument 6

ARGUMENT.

I. If petitioner's construction of that part of Section 24 of the Clayton Act relied on by it be accepted, it would result in an arbitrary discrimination. Such a construction, which would require a part of Section 24 to be declared unconstitutional, should be avoided, if possible 7

II. If Section 24 is construed as petitioner contends, then the part thereof which relates to suits brought by the United States is unconstitutional, and the judgment of the court below must still be affirmed. 13

III. The opinion of the Circuit Court of Appeals presents the proper interpretation of Sections 21 to 24 of the Clayton Act inclusive..... 15

IV. The procedure followed at the trial of the contempt is of no materiality here 20

V. Respondent's consent, if given, to the imposition of a sentence in excess of six months, does not preclude

PAGE

him from attacking the sentence on the ground that it exceeds six months 20

CONCLUSION. The judgment appealed from should be affirmed 21

APPENDIX, The Statutes Involved..... 22

Clayton Act, Section 21 (28 U. S. C. A., § 386)... 22
Clayton Act, Section 22 (28 U. S. C. A., § 387) 22
Clayton Act, Section 24 (28 U. S. C. A., § 389) 24
Judicial Code, Section 268 (28 U. S. C. A., § 385) .. 25
Penal Law of New York, Section 530 25
Paragraphs "4", "5", and "6" of the Information ... 26

Citations.

Cases:

Bedford Cut Stone Co. v. Journeymen Stone Cutters' Assn., 274 U. S. 37..... 8
Bessette v. W. B. Conkey Co., 194 U. S. 324, 328..... 9
Brougham v. Oceanic Steam Navigation Co., 205 F. 857, 860 (C. C. A. 2)..... 21
Canoe Creek Co. v. Christinson, 281 F. 559 (D. C. Ky.) 19
Carter v. Carter Coal Co., 298 U. S. 238, 312..... 14
Chapman & Dewey Lumber Co. v. St. Francis Levee District, 234 U. S. 667 20
Chicago B. & Q. Ry. Co. v. Willard, 220 U. S. 413..... 21
Colgate v. Harvey, 296 U. S. 404, 423 9
Creekmore v. United States, 237 F. 743 (C. C. A. 8, certiorari denied 242 U. S. 646) 19
DeBeukelaer v. People, 25 Ill. App. 460..... 9

PAGE

Dorchy v. Kansas, 264 U. S. 286, 290 14
Duplex Printing Press Co. v. Deering, 254 U. S. 443... 8
Ex Parte Mallon 16, Idaho, 737, 102 Pac. 374..... 12
Forrest v. United States, 277 F. 873 (C. C. A. 9)..... 19
Fox v. Capital Co., 57 Sup. Ct., 57 (Oct. Term, 1936)... 9
Gompers v. Bucks Stove & Range Co., 221 U. S. 418, 441. 9
Gregory v. Pike, 67 F. 837, 852 (C. C. A. 1)..... 20
Gulf Colorado & Santa Fe Railway Co. v. Ellis, 165 U. S. 150, 159 12
Hayes v. Missouri, 120 U. S. 68, 81 8
Heiner v. Donnan, 285 U. S. 312, 326..... 7
Hurtado v. California, 110 U. S. 516, 535 7
In re Kahn, 204 Fed. 581 (C. C. A. 2)..... 9
Mansfield, C. & L. M. R. Co. v. Swan, 111 U. S. 379.... 21
Maxwell Land-Grant Case, 122 U. S. 365, 375..... 20
Michaelson v. U. S. 266 U. S. 42, 65 8
Missouri Pacific Railroad Co. v. Boone, 270 U. S. 466, 472 13
Nichols v. Coolidge, 274 U. S. 531, 542..... 7
Penal Law, Section 530 25
People v. Weiner, 264 N. Y. 534..... 16
Prussian v. United States, 282 U. S. 675, 677 18
Radio Corporation of America v. Lord, 28 F. (2d) 257.. 8
Russian Volunteer Fleet v. United States, 282 U. S. 481, 492 13
Ryals v. United States, 69 Fed. (2d) 946, (C. C. A. 5).. 12
Smyth v. Ames, 169 U. S. 466 7
Stewart Dry Goods Co. v. Lewis, 294 U. S. 550, 559-560 13
Swepston v. United States, 251 F. 205, (C. C. A. 6)..... 19
United States v. Armstrong, 265 Fed. 683, 691 (D. C. Indiana) 7
United States v. Bennett, 232 U. S. 299, 303..... 13

PAGE

United States v. Goldman, 277 U. S. 299 19
United States v. New York, N. H. & H. R. Co., 165 F. 742 (C. C. D. Mass.) 9, 10
United States v. Standard Brewery, Inc., 251 U. S. 210, 220 13
United States v. Taliaferro, 290 F. 214 (D. C. Va.) 19
United States v. Weitzel, 246 U. S. 533, 543 18
United States v. Yount, 267 Fed. 861, 863 (D. C. Pa.) .. 7
Utah Power & Light Co. v. Pfost, 286 U. S. 165, 185 14

Statutes:

Clayton Act, Section 16 (15 U. S. C. A., §26) 8
Clayton Act, Section 21 (28 U. S. C. A., § 386) 22
Clayton Act, Section 22 (28 U. S. C. A., § 387) 22
Clayton Act, Section 24 (28 U. S. C. A., § 389) 24
Clayton Act, Section 27 (15 U. S. C. A., § 27) 13, 14
Judicial Code, Section 248a (28 U. S. C. A., § 347a) 2
Judicial Code, Section 268 (28 U. S. C. A., § 385) 25
Penal Law of New York, Section 530 25

Congressional Reports:

48 Congressional Record, Pt. 9, pp. 8798, 8807—62nd Congress, 2nd Session 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 171.

HENRY C. HILL, Warden, United States Northeastern Penitentiary,

Petitioner,

v.

UNITED STATES, ex rel. JOSEPH WEINER.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

Respondent's Brief.

Opinions Below.

The opinion of the District Court for Middle Pennsylvania, filed June 25, 1935, is reported in 11 Fed. Supp. 195 (R. 146-149).

The majority and dissenting opinions of the Circuit Court of Appeals for the Third Circuit filed January 8, 1936, are reported in 84 F. (2d) 27 (R. 163-169). The opinion of the Circuit Court of Appeals, Third Circuit on rehearing, filed June 8, 1936, is reported in 84 F. (2d) 31 (R. 176-179).

Jurisdiction.

Jurisdiction is invoked under Section 248 (a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A., § 347-a). The judgment of the Circuit Court of Appeals was entered June 8, 1936 (R. 179). The petition for a writ of certiorari was filed July 8, 1936 and was granted October 12, 1936 (R. 180).

Questions Presented.

(1) Whether the limitation of six months on sentences for criminal contempt, as provided in Sections 21 and 22 of the Clayton Act (28 U. S. C. A., § 386, 387) is applicable to contempts for violation of a decree entered in a suit brought by the United States, *where the contumacious acts also constitute criminal offenses under a Statute of the United States or under the laws of the State in which such acts were committed;* or whether such contempts are excepted from the provisions of Sections 21 and 22 of the Clayton Act, by Section 24 of said Act (28 U. S. C. A., § 389).

(2) Whether that part of Section 24 of the Clayton Act (28 U. S. C. A., § 389) which relates to suits brought or prosecuted in the name or on behalf of the United States, if given the construction for which petitioner contends, results in an arbitrary discrimination depriving respondent of his liberty without due process of law.

Statutes Involved.

The statutes involved, Sections 21, 22 and 24 of the Clayton Act (28 U. S. C. A., § 386, 387, 389) and Section 268 of the Judicial Code (28 U. S. C. A., § 385), are printed in an appendix hereto.

Statement.

The respondent, Joseph Weiner, was convicted of criminal contempt, for violation of a decree of the United States District Court for Southern New York, entered February 6, 1932, in a suit in equity under the Sherman Anti-Trust Act, brought by the United States against the Greater New York Live Poultry Chamber of Commerce, and others, including the respondent (affirmed sub. nom. *"Local 167 et al.* v. *United States."* 291 U. S. 293) (R. 3; Ex. 10, R. 56-69). The decree adjudged that 99 defendants, including the respondent, had participated in a conspiracy to restrain and monopolize interstate commerce in live poultry, in violation of the Sherman Anti-Trust Act; and enjoined the commission of certain specified acts, including, *inter alia*, the coercion of marketmen "to buy poultry, poultry feed, or other commodities necessary to the poultry business, from any particular seller thereof" (R. 3, 7-11).*

By information filed July 31, 1933, the United States Attorney for Southern New York, accused the respondent and others of criminal contempt, alleging that the cited defendants had committed specified acts of coercion and intimidation in violation of the said decree. These acts are separately described in separately numbered paragraphs of the information (R. 17-30).

The District Court for Southern New York found the respondent guilty of criminal contempt in the commission

---

* Prior to the granting of this injunction respondent and others had been indicted for violation of the Sherman Anti-Trust Act. The indictment was dismissed as against the respondent at the close of the government's case (R. 94).

of the acts specified in paragraphs "4," "5" and "6" of the information (R. 5; 21-22; 62-63).

Paragraph "4" charged the respondent with using his position in Local 440 of the Poultry Schochtim Union of Greater New York, a labor union: to coerce marketmen to buy poultry feed from the Metropolitan Poultry Feed Corporation; to coerce marketmen to employ workmen in excess of their reasonable requirements, "for the purpose among others of compelling said marketmen to buy their feed exclusively from the Metropolitan Feed Corporation"; and to spy upon marketmen for the same purpose (R. 21).

Paragraph "5" of the information charged the respondent with visiting the S. S. & B. Market at 1314 Cooper Ave., Bronx, N. Y., and threatening to injure one of its proprietors, and the property of said market, unless the proprietors thereof bought poultry coops exclusively from the New Jersey Coop Company; and with thereafter causing the S. S. & B. Market to be wrecked and damaged, and the proprietors, employees of the S. S. & B. Market and other persons in the poultry trade in Greater New York to be terrified and put in fear (R. 21-22).

Paragraph "6" of the information charged the respondent with using his position as an official delegate of Local 440 of the Orthodox Slaughterers of America, Inc., to coerce Sam Weiner and others to buy their poultry and other commodities from particular sellers, and to employ laborers in excess of their reasonable requirements (R. 22). (Paragraphs "4," "5" and "6" of the information are printed in full in the appendix hereto, pp. 26-28).

The conviction for criminal contempt followed a trial before the District Court for Southern New York, the respondent having waived a trial by jury (R. 5).

Certain of the acts specified in paragraphs "5" and "6" of of the information were also the basis of a criminal prosecution against the respondent for violation of Section 530 of the Penal Law of the State of New York,* which resulted in the respondent's conviction and sentence in the State Court for an indeterminate term of imprisonment of six months to three years (R. 117, 122-123). (*People* v. *Weiner*, 264 N. Y. 534; two judges dissenting.) The respondent was serving this sentence at the time of the trial in the Federal Court for criminal contempt (R. 45, 117).

The respondent was originally sentenced by the United States District Court for Southern New York to serve six months in Detention Headquarters in the City of New York for the contempts charged in paragraph "4" of the information, and two years in the penitentiary for the contempts charged in paragraphs "5" and "6" (R. 5, 66-67).

On June 5, 1934, upon respondent's application, the sentence as to paragraph "4" was modified to "one year and a day in the penitentiary, sentence on paragraph "4" to run concurrently with sentence on paragraphs 5 and 6" (R. 5, 143, 146).

Upon completion of his prison term for violation of Section 530 of the Penal Law of the State of New York,† respondent was committed to the United States Northeastern Penitentiary at Lewisburg, Pa. (R. 11, 12-13). After serving six months of his sentence at Lewisburg, respondent sought his release by petition for a writ of habeas corpus filed in the United States District Court for Middle Pennsylvania, alleging that the sentence of the United States District Court for

---

* Section 530 of the Penal Law is printed in the appendix hereto, page 25.

† The respondent was imprisoned ten months for violation of this Section of the Penal Law.

Southern New York was void, and contrary to Section 22 of the Clayton Act, to the extent that it was in excess of six months (R. 3-6). His petition was granted and his discharge ordered (R. 146-150).

The Circuit Court of Appeals, Third Circuit, affirmed, one judge dissenting (R. 163-169). Upon a rehearing, granted on the petition of the Warden, the Circuit Court of Appeals filed a unanimous opinion, reiterating the grounds of affirmance (R. 176-179).

Summary of Argument.

I. If petitioner's construction of that part of Section 24 of the Clayton Act relied on by it be accepted, it would result in an arbitrary discrimination. Such a construction, which would require a part of Section 24 to be declared unconstitutional, should be avoided, if possible.

II. If Section 24 is construed as petitioner contends, then the part thereof which relates to suits brought by the United States is unconstitutional, and the judgment of the Court below must still be affirmed.

III. The opinion of the Circuit Court of Appeals presents the proper interpretation of Sections 21 to 24 of the Clayton Act inclusive.

IV. The procedure followed at the trial of the contempt is of no materiality here.

V. Respondent's consent, if given, to the imposition of a sentence in excess of six months, does not preclude him from attacking the sentence on the ground that it exceeds six months.

ARGUMENT.

I.

If petitioner's construction of that part of Section 24 of the Clayton Act relied on by it be accepted, it would result in an arbitrary discrimination. Such a construction, which would require a part of Section 24 to be declared unconstitutional, should be avoided, if possible.

The petitioner contends that Sections 21 and 22 of the Clayton Act are applicable, by reason of the provisions of Section 24 of said Act, only to violations of decrees entered in suits and actions brought by private parties. Violations of decrees entered in a suit brought by the United States, petitioner argues, even though the acts of contempt constitute independent criminal offenses, are not within the scope of Sections 21 and 22. This construction, we submit, results in an arbitrary discrimination and a denial of due process of law to the respondent.

Due process requires that "no greater burdens shall be laid upon one than is laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses" *Barbier* v. *Connolly*, 113 U. S. 27, 31. Thus an arbitrary and discriminatory classification by Congress is repugnant to the Fifth Amendment. *Heiner* v. *Donnan*, 285 U. S. 312, 326; *Nichols* v. *Coolidge*, 274 U. S. 531, 542; *Smyth* v. *Ames*, 169 U. S. 466; *Hurtado* v. *California*, 110 U. S. 516, 535; *United States* v. *Armstrong*, 265 Fed. 683, 691 (D. C. Ind.); *United States* v. *Yount*, 267 Fed. 861, 863 (D. C. Pa.). The Constitutional prohibition against arbitrary and discriminatory

legislation applies equally to privileges conferred as well as to burdens imposed. *Hayes* v. *Missouri*, 120 U. S. 68, 81.

What is the nature of the arbitrary discrimination which results if the petitioner's interpretation of Section 21 be accepted? In a prosecution for contempt for violation of a decree entered in a suit commenced by a private party, where the contempt also constitutes an independent criminal offense, the defendant, petitioner concedes, is entitled to a trial by jury and if found guilty can be sentenced to a maximum of six months' imprisonment. (Section 22 of the Clayton Act.) Yet, in a prosecution for contempt for violation of a decree entered in a suit brought by the United States, the defendant, petitioner contends, is not entitled to a jury trial and may be sentenced in the discretion of the court—although the decrees violated, and the acts of contempt committed, be identical in both cases.* Under this interpretation, the defendants' rights are not dependent solely upon the character of the offense committed. Instead, an extraneous consideration, the identity of the party plaintiff in the suit in which the decree violated was entered is made a determining factor.

The nature of criminal contempt, to which Section 22 of the Clayton Act "relates exclusively," (*Michaelson* v. *U. S.*, 266 U. S. 42, 65) does not permit differences in procedure and punishment based upon so arbitrary a factor as the identity of the plaintiff in the suit in which the decree violated

---

* The same injunctive relief may be secured by a private party as by the United States under Section 16 of the Clayton Act. (15 U. S. C. A. § 26) *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443; *Bedford Cut Stone Co.* v. *Journeymen Stone Cutters' Assn.*, 274 U. S. 37, 53; *Radio Corporation of America* v. *Lord*, 28 F. (2d) 257, (C. C. A. 3).

was entered.† Criminal contempt for violation of a Court's decree results only where there is an affront to the dignity of the court. *Fox* v. *Capital Co.*, 57 Sup. Ct. 57 (Oct. Term, 1936); *Bessette* v. *W. B. Conkey Co.*, 194 U. S. 324, 328; *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 441; *De Beükelaer* v. *People*, 25 Ill. App. 460. And the purpose of punishment for criminal contempt is to enforce respect for and obedience to the court's orders, regardless of the identity of the parties securing the same.* The *only* permissible basis, "founded upon pertinent and real differences," for a distinction between the punishments which can be imposed upon defendants, is therefore the degree of seriousness of the affront to the court. Except when its sovereign prerogatives are threatened, the government must be subjected to the same limitations as any other litigant. It is the dignity of the court, and not any sovereign prerogative, which is threatened by a criminal contempt. And the dignity of the court is in no greater need of vindication when the United States is the plaintiff in the suit in which the decree violated is entered, than when a private party is the plaintiff.

In *United States* v. *New York, N. H. & H. R. Co.*, 165 F. 742 (C. C. D. Mass.) the court had before it for consider-

---

† "The classification, in order to avoid the constitutional prohibition, must be founded upon pertinent and real differences, as distinguished from irrelevant and artificial ones. * * * 'Mere difference, is not enough'." *Colgate* v. *Harvey*, 296 U. S. 404, 423.

* A sentence to a fixed and absolute term of imprisonment for contempt such as that which can be imposed under Section 22 of the Clayton Act, can be justified only by showing that it was imposed in a proceeding for criminal contempt. *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418; *In re Kahn*, 204 Fed. 581 (C. C. A. 2).

ation Section 1 of the Sherman Anti-Trust Act, which provided in part that the "government could file a certificate of general public importance" in any suit in equity under the Sherman Anti-Trust Act, and ask for a court of three judges, with preference over other cases. It was contended by the respondents (p. 745) that "the statute in question is so framed that it is limited to a particular class of cases, and operative only at the request of the United States, and can never be called on by a respondent, and never by either party in suits brought by others than the United States." The Court said in answer to this contention (p. 745):

> "There can be no question that this makes an apparent discrimination, yet we are unable to perceive that it is injurious to the respondents, or any other possible respondents, in any legal sense of the word. * * * Therefore, we say the statute under which the Attorney General filed his certificate is not injurious because, on the whole, when availed of, it operates for the protection of the interests of respondents, more than for those of the United States."

In the case at bar, however, the injurious effect of the discrimination which would result, if the petitioner's contention be sustained, is apparent. Similar acts violative of like decrees may result in one case in a sentence of indeterminate and unlimited length, and the denial of a jury trial; and in another case, differing in no essentials, in a maximum sentence of six months' imprisonment, and the granting of a jury trial. No claim can be made here as in the *New York, N. H. & H. R. Co.* case, *supra*, that this statute would "operate for the protection of the interests of respondents more than for those of the United States." On the other hand, if the interpretation given this statute by the Circuit Court of Appeals be adopted, then the United States and all

other complainants will stand upon the same footing of equality without a substantial ground for complaint by anyone.

The classification of contempt suits contended for by the petitioner is warranted neither by reason, logic, the nature of criminal contempt, nor the objectives sought by the enactment of Sections 21-24 of the Clayton Act. The purpose of these sections, in fact, rebuts any suggestion that the discrimination in favor of the United States is reasonable.* These sections of the Clayton Act were designed to prevent courts of equity from invading the criminal domain and under the guise of trials for contempt convicting persons of substantive crimes for which, if indicted, they would have a constitutional right to trial by jury. (48 Congressional Record, Pt. 9, pp. 8798, 8807—62nd Congress, 2nd Session.) The means adopted to effect that purpose are: (a) a trial "by the court, or, upon demand of the accused, by a jury" and (b) conformity of such trial "as near as may be, to the practice in criminal cases prosecuted by indictment or upon information." (Section 22 of the Clayton Act.)

The applicability of these sections is made dependent upon whether the contempt is also an independent crime under a state or federal statute (Section 21 of the Clayton Act). The character and nature of the contempt are thus the basis of the punishment imposed. Matters disconnected with the

---

* No reason is advanced in the majority report of the committee on the judiciary for the exception contended for by the petitioner. Any statement upon the floor of Congress which tends to support an interpretation resulting in the unconstitutionality of the statute must be disregarded.

nature of the crime committed, such as the identity of the complainant, should therefore, be disregarded. (*Ex parte Mallon 16, Idaho,* 737, 102 Pac. 374). Petitioner's interpretation, we submit, is contrary to the general purpose of Sections 21-24 of the Clayton Act, as well as the nature of criminal contempt.

In addition, despite the provisions of Section 22 of the Clayton Act, which limit the punishment for contempt, most probably because of the likelihood of the defendant being punished again for the substantive crime involved, the petitioner would have the respondent serve a two year sentence for contempt in the federal penitentiary after serving a prison term in New York for the commission of certain of the acts constituting the contempt.*

No substantial and real differences are suggested by the purpose of the Clayton Act, which permit the imposition of a penalty upon one individual "which is not imposed upon others guilty of like delinquency." *Gulf Colorado & Santa Fe Railway Co.* v. *Ellis,* 165 U. S. 150, 159. A difference in the identity of the complainant surely provides no reasonable basis for the difference in procedure and punishment which results if petitioner's interpretation be accepted. Likewise a reason advanced in Congress, that "the anti-trust statutes

---

* The trial court completely disregarded the principle upon which punishment under Section 268 of the Judicial Code (28 U. S. C. A. 385) should be administered, as well as the express provisions of Section 22 of the Clayton Act. (28 U. S. C. A. 387.) In *Ryals* v. *United States,* 69 Fed. (2d) 946, (C. C. A. 5) it was stated at page 948: "It follows also that the six-month limit of imprisonment for contempt contained in section 387 of 28 U. S. C. A., does not apply here, though it ought to have great weight in punishing criminal contempts under section 385 of 28 U. S. C. A."

are still in a formative stage", is legally inadequate to justify the discrimination. Mere facilitation of administration will not justify an otherwise arbitrary and discriminatory classification. *Stewart Dry Goods Co.* v. *Lewis,* 294 U. S. 550, 559-560.

An interpretation such as that sought by the petitioner, which would require the statute to be declared arbitrary, discriminatory and unconstitutional should be avoided. *Russian Volunteer Fleet* v. *United States,* 282 U. S. 481, 492; *Missouri Pacific Railroad Co.* v. *Boone,* 270 U. S. 466, 472; *United States* v. *Standard Brewery, Inc.,* 251 U. S. 210, 220; *United States* v. *Bennett,* 232 U. S. 299, 303.

II.

If Section 24 is construed as petitioner contends, then the part thereof which relates to suits brought by the United States is unconstitutional, and the judgment of the court below must still be affirmed.

We need not repeat here our argument that that part of Section 24 which relates to suits brought or prosecuted by the United States, if given the construction for which the petitioner contends, is unconstitutional by reason of the arbitrary discrimination which results. There remains, however, the question whether, if that part of Section 24 is declared unconstitutional, the remainder of Section 24 and Sections 21 and 22 will still be in full force and effect.

The express provisions of Section 27 of the Clayton Act (15 U. S. C. A. 27) permit separability. This section provides:

> "If any clause, sentence, paragraph, or part of this Act, shall for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph or part thereof directly involved in the controversy in which such judgment shall have been rendered."

Although the statute thus prescribes the rule by which construction shall be governed, "the rule is not an inexorable mandate". *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 312, *Dorchy* v. *Kansas*, 264 U. S. 286, 290, *Utah Power & Light Co.* v. *Pfost*, 286 U. S. 165, 185. It does create, however, a presumption in favor of divisibility and shifts the burden to the petitioner to show its inseparability. *Carter* v. *Carter Coal Co., supra; Utah Power & Light Co.* v. *Pfost, supra.* The purpose of Sections 21-24 of the Clayton Act, to prevent courts of equity from invading the criminal domain, and to grant the defendant a jury trial when the contempt in violation of a decree constitutes an independent criminal offense, is consistent with the elimination from Section 24 of said Act of any exception in favor of the United States. The entire statute should not be sacrificed by reason of the invalidity of the exception. As stated in *Utah Power & Light Co.* v. *Pfost*, 286 U. S. 165 at p. 185:

> "We find no warrant for concluding that the legislature would have been content to sacrifice an important revenue statute in the event that relief from its burdens in respect of particular individuals should become ineffective. On the contrary, it seems entirely reasonable to suppose that if the legislature had expressed itself specifically in respect of the matter, it would have declared that the tax, being the vital aim of the act, was to be preserved even though the specified exemptions should fall for lack of validity. *Field* v. *Clark*, 143 U. S. 649, 696-697; *People ex rel. Alpha P. C. Co.* v. *Knapp*, 230 N. Y. 48, 60-63; 129 N. E. 202."

The concluding sentence of Section 24, which provides that in all cases not "specifically embraced within Section 21" the contemner is to be proceeded against and punished in conformity with the usages in law and in equity, is consistent with separability. The cases embraced by the very general terms of Section 21 include all cases of contempt in violation of decrees, whether entered in suits brought by the United States or a private party, "if the contempt constituted also a criminal offense under any statute of the United States, or under the laws of any statute under which the act was committed."

III.

The opinion of the Circuit Court of Appeals presents the proper interpretation of Sections 21 to 24 of the Clayton Act inclusive.

The contempt with which the respondent was charged is directly within the purview of Section 21 of the Clayton Act (28 U. S. C. A. 386).

The acts of contempt committed by the respondent are of such character as to constitute a criminal offense under both a statute of the United States and the laws of the State of New York, in which they were committed. The injunction restrained the respondent from committing specified acts in violation of the Sherman Anti-Trust Act. The contempts committed in violation of the injunction were new and independent offenses for which he was subject to criminal prosecution under said Act. For the same acts he was also subject to prosecution under Section 530 of the Penal Law of the State of New York. Respondent actually was prosecuted

and punished under that section for certain of the acts specified in paragraphs "5" and "6" of the information (*People* v. *Weiner*, 264 N. Y. 534).

Where the contempt is in disobedience of the decree of the District Court and also constitutes an independent criminal offense, the contemner is proceeded against as provided in Section 22 of the Clayton Act, which specifically grants him the right to a trial by jury and limits his punishment to a maximum of six months' imprisonment. Since Sections 21 and 22 of the Clayton Act are applicable, the respondent could not be sentenced to imprisonment for a term in excess of six months. His sentence to imprisonment for two years was, therefore, void to the extent that it was in excess of six months.

The petitioner contends, however, that Section 24 of the Clayton Act limits the application of Sections 21 and 22 to prosecutions for criminal contempts in violation of decrees obtained by private parties, and that contempts in violation of decrees obtained by the United States are punished in conformity to the usages in law and in equity. If such were the purpose of Section 21 of the Clayton Act, it could easily have been expressed substantially as follows:

> "Any person who shall willfully disobey any lawful * * * decree or command of any district court of the United States or any court of the District of Columbia, *in a suit or action between private parties;* by doing, etc."

Section 21, however, is general and all inclusive. It applies to contempts committed by "*any* person" in violation of "*any* lawful writ, process, order, rule, decree or demand of any District Court of the United States or any court of the District of Columbia" where the contempt also constitutes an independent criminal offense (Italics ours).

The petitioner's interpretation of Section 24 entirely overlooks the significance of the last portion of that section:

> "* * * but the same, and all other cases of contempt not specifically embraced within Section 386 of this title (Sec. 21 of the Clayton Act), may be punished in conformity to the usages at law and in equity prevailing on October 15, 1914."

Those cases of contempt "not specifically embraced within Section 21" were the only ones in which the contemner was to be proceeded against and punished in conformity with the usages in law and in equity prevailing on October 15, 1914.* The phrase, "but the same, and all other cases," indicates that everything in Section 24 of the Clayton Act, preceding it, related to cases where the contempt was not specifically embraced within Section 21. The preceding exception in Section 24 dealing with violations of decrees entered in suits brought by the United States, could only refer, therefore, to cases where the contempt did not constitute an independent criminal offense. Cases, such as the instant case, where the contempt committed in violation of a decree is also an independent criminal offense are "specifically embraced" within Section 21. As stated by the Circuit Court of Appeals:

> "Contempt is specifically embraced within section 21 of the Clayton Act, so that it must be prosecuted under section 22 of the Act and not under section 268 of the Judicial Code, when an order or decree or the court is violated and the violation at the same time constitutes an independent criminal offense. When these two things take place in one and the same act, then the contemner must be prosecuted under section 22 of the Act, whether or not the decree was entered in a suit or action brought or prosecuted in the name of, or on behalf of, the United

---

* That is, pursuant to the provisions of Section 268 of the Judicial Code. (Appendix, p. 25).

States, or by private parties. The antecedents of the word 'same' in section 24 in the sentence beginning with the words 'but the same,' and all other cases of contempt,' etc., are not only the contempts committed in the presence of the court or so near thereto as to obstruct the administration of justice, but also contempts committed in disobedience of any lawful writ, process, order or decree entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, and all other cases of contempt not embraced in section 21. In other words these antecedent types of contempts, whether by private parties or the government, must be prosecuted under the law as it was when the Clayton Act was passed, but those contempts, which are specifically embraced within section 21 of the Clayton Act must be prosecuted under section 22 of the Act in which the contemner may demand a jury trial. That is, all kinds of contempt, with one exception, must be tried as they were on October 15, 1914, and that is by the court without a jury. That one exception is created and defined by sections 21, 22 and 24 of the Clayton Act and there is a good reason for the exception: A person may not be tried and convicted for the commission of a crime, even though the crime involves the violation of the decree of a court, without the right of trial by jury. This right the constitution gives him" (R. 178).

If there be any doubt as to the interpretation of the sections of the Clayton Act in question, they must be construed, as a criminal statute, strictly in favor of the personal liberty of the accused. *United States* v. *Weitzel*, 246 U. S. 533, 543; *Prussian* v. *United States*, 282 U. S. 675, 677.

Since the acts of contempt committed by respondent also constituted criminal offenses, they fall directly within the provisions of Section 21 of the Clayton Act, and punishment should, therefore, have been limited, as held below, to that prescribed in Section 22 of said Act.

In *United States* v. *Goldman*, 277 U. S. 229, cited by petitioner, the court did not have before it the question pre-

sented in the case at bar. The *Goldman* case merely decided that the period of limitation fixed by Section 25 of the Clayton Act did not apply to all contempts, but only to those within the purview of Section 21 to 24 of the Clayton Act. The court did not pass upon the effect of the last phrase of Section 24. Nor did it consider whether the contempt charged constituted a crime under a statute of the United States or the laws of the State where committed. Likewise, it did not pass upon the constitutionality of Section 24, if petitioner's interpretation thereof be accepted.*

---

* In *Forrest* v. *United States*, 277 F. 873 (C. C. A. 9), cited by petitioner, the court was not concerned with the punishment of the defendant, and the order violated was not entered in an equity suit under the Sherman Anti-Trust Act. In *Swepston* v. *United States*, 251 F. 205, (C. C. A. 6), the defendant did not demand a jury trial pursuant to Section 22 of the Clayton Act. The court's brief statement concerning Sections 22 and 24 was therefore clearly *obiter*. The same is true of *United States* v. *Taliaferro*, 290 F. 214 (D. C. W. D., Va.), where the court specifically found that the contempt did not constitute a crime under a federal or state law.

That Sections 21, 22 and 24 of the Clayton Act were not intended to repeal the provisions of Section 268 of the Judicial Code is conceded. It is apparent not only from the decision in *Canoe Creek Co.* v. *Christinson*, 281 F. 559 (D. C. Ky.), reversed on other grounds 293 F. 379, 266 U. S. 42, but also from the very language of Section 24 of the Clayton Act. The sentence of a year and a day in *Creekmore* v. *United States*; 237 F. 743 (C. C. A. 8, certiorari denied 242 U. S. 646) was imposed under Section 268 of the Judicial Code, under which the court is granted complete discretion. Under Section 22 of the Clayton Act, a sentence of that duration is clearly improper.

IV.

The procedure followed at the trial of the contempt is of no materiality here.

The procedure followed by the District Court for Southern New York upon the trial of the respondent for contempt, or the reasons advanced for the waiver by the respondent of a jury trial* are of no materiality. The sole question for consideration below was the source of the trial court's power to punish for contempt and whether that power was properly exercised.

V.

Respondent's consent, if given, to the imposition of a sentence in excess of six months, does not preclude him from attacking the sentence on the ground that it exceeds six months.

Even if it be assumed that respondent consented to a sentence of two years, which we deny, as a sentence in excess of six months was beyond the power of the trial court, the respondent's consent thereto could not serve to enlarge its powers. An order in excess of the authority or jurisdiction of the court, even though issued with the consent of the

---

* Exhibit "A" (R. 155-157) was filed by the Government for the first time upon a petition for rehearing in the District Court and is, therefore, extraneous to the Record. *Maxwell Land-Grant Case*, 122 U. S. 365, 375; *Chapman & Dewey Lumber Co. v. St. Francis Levee District*, 234 U. S. 667; *Gregory v. Pike*, 67 F. 837, 852 (C. C. A. 1st).

parties, is void and subject to direct or collateral attack at any time. *Mansfield, C. & L. M. R. Co.* v. *Swan,* 111 U. S. 379; *Chicago, B. & Q. Ry. Co. v. Willard,* 220 U. S. 413; *Brougham v. Oceanic Steam Navigation Co.,* 205 F. 857, 860 (C. C. A. 2).

CONCLUSION.

The judgment appealed from should be affirmed.

Respectfully submitted,

SAMUEL H. KAUFMAN,
Attorney for Respondent.

SETH W. RICHARDSON,
SAMUEL H. KAUFMAN,
EUGENE M. PARTER.
Of Counsel.

APPENDIX.

The Statutes Involved.

Section 21 of the Clayton Act (28 U. S. C. A., §386):

Contempts; when constituting also criminal offense. Any person who shall willfully disobey any lawful writ, process, order, rule, decree, or command of any district court of the United States or any court of the District of Columbia by doing any act or thing therein, or thereby forbidden to be done by him, if the act or thing so done by him be of such character as to constitute also a criminal offense under any statute of the United States or under the laws of any State in which the act was committed shall be proceeded against for his said contempt as hereinafter provided. (Oct. 15, 1914, c. 323, §21, 38 Stat. 738.)

* * * *

Section 22 of the Clayton Act (28 U. S. C. A., §387):

Same; procedure; bail; attachment; trial, punishment. Whenever it shall be made to appear to any district court or judge thereof, or to any judge therein, sitting, by the return of a proper officer on lawful process, or upon the affidavit of some credible person, or by information filed by any district attorney, that there is reasonable ground to believe that any person has been guilty of such contempt, the court or judge thereof, or any judge therein sitting, may issue a rule requiring the said person so charged to show cause upon a day certain why he should not be punished therefor, which rule, together with a copy of the affidavit or information, should be served upon the person charged, with sufficient promptness to enable him to prepare for and make

return to the order at the time fixed therein. If upon or by such return, in the judgment of the court, the alleged contempt be not sufficiently purged, a trial shall be directed at a time and place fixed by the court. If the accused, being a natural person, fail or refuse to make return to the rule to show cause, an attachment may issue against his person to compel an answer, and in case of his continued failure or refusal, or if for any reason it be practicable to dispose of the matter on the return day, he may be required to give reasonable bail for his attendance at the trial and his submission to the final judgment of the court. Where the accused is a body corporate, an attachment for the sequestration of its property may be issued upon like refusal or failure to answer.

In all cases within the purview of sections 381 to 383, 386 to 390 of this title, section 412 of Title 18, section 52 of Title 29 and sections 12 to 27 of Title 15, such trial may be by the court, or, upon demand of the accused, by a jury; in which latter event the court may impanel a jury from the jurors then in attendance, or the court or the judge thereof in chambers may cause a sufficient number of jurors to be selected and summoned, as provided by law, to attend at the time and place of trial, at which time a jury shall be selected and impaneled as upon a trial for misdemeanor; and such trial shall conform, as near as may be, to the practice in criminal cases prosecuted by indictment or upon information.

If the accused be found guilty, judgment shall be entered accordingly, prescribing the punishment, either by fine or imprisonment, or both, in the discretion of the court. Such fine shall be paid to the United States or to the complainant or other party injured by the act constituting the contempt,

or may, where more than one is so damaged, be divided or apportioned among them as the court may direct, but in no case shall the fine to be paid to the United States exceed, in case the accused is a natural person, the sum of $1,000, nor shall such imprisonment exceed the term of six months. In any case the court or a judge thereof may, for good cause shown, by affidavit or proof taken in open court or before such judge and filed with the papers in the case, dispense with the rule to show cause, and may issue an attachment for the arrest of the person charged with contempt; in which event such person, when arrested, shall be brought before such court or a judge thereof without unnecessary delay and shall be admitted to bail in a reasonable penalty for his appearance to answer to the charge or for trial for the contempt; and thereafter the proceedings shall be the same as provided herein in case the rule had issued in the first instance. (Oct. 15, 1914, c. 323, §§22, 38 Stat. 738.)

* * * *

Section 24 of the Clayton Act (28 U. S. C. A., § 389):

Same; not specifically enumerated. Nothing contained in sections 386 to 388 and 390 of this title shall be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same and all other cases of contempt not specifically embraced within section 386 of this title, may be punished in conformity to the usages at law and in equity prevailing on October 15, 1914. (Oct. 15, 1914, c. 323, § 24, 38 Stat. 739.)

Section 268 of the Judicial Code (28 U. S. C. A., § 385):

Administration of oaths; contempts. The said courts shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority. Such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts. (R. S. § 725; Mar. 3, 1911, c. 231, § 268, 36 Stat. 1163.)

Section 530 of the New York Penal Law:

Coercing another person a misdemeanor. A person who with a view to compel another person to do or to abstain from doing an act which such other person has a legal right to do or to abstain from doing, wrongfully and unlawfully,

1. Uses violence or inflicts injury upon such other person or his family, or a member thereof, or upon his property or threatens such violence or injury; or,

2. Deprives any such person of any tool, implement or clothing or hinders him in the use thereof; or,

3. Uses or attempts the intimidation of such person by threats or force,

Is guilty of a misdemeanor.

Paragraphs "4", "5" and "6" of the Information.

Paragraph 4. Defendants Joseph Weiner, Arthur Herbert, Charles Herbert and Sidney Rosenstein are part owners of, and/or receive payments from, the Metropolitan Poultry Feed Corporation, which now is and continuously since the entry of said decree has been, engaged in selling poultry feed to receiver, marketmen and poultry dealers in Greater New York at excessive prices. During all of said period of time, Arthur Herbert has been an official delegate and business delegate of Local 167, Charles Herbert and Joseph Weiner have been official delegates and business representatives of Local 440 of the Poultry Schochtim Union of Greater New York, and Sidney Rosenstein has been a member of Local 167; all of said defendants have used their offices and positions in said labor unions for the purpose of coercing marketmen to buy poultry feed from the Metropolitan Poultry Feed Corporation, in violation of paragraph 8-l of said decree, such instances being too numerous to mention; all of said defendants have threatened to cause and have caused and coerced marketmen to employ laborers in excess of their reasonable requirements, for the purpose, among others, of compelling said marketmen to buy their poultry feed exclusively from the Metropolitan Poultry Feed Corporation, in violation of Paragraph 8-g of said decree, such instances being too numerous to mention; and said defendants have spied upon marketmen for the purpose of ascertaining the source of their poultry feed, in violation of paragraph 8-h of said decree, such instances being too numerous to mention.

Paragraph 5. On or about December 21, 1932, defendant Joseph Weiner, accompanied by Jacob Roth, Harry Dratt,

Hyman Dratt, and other individuals to the United States Attorney unknown, visited the SS&B Market at 1314 Cooper Avenue, Bronx, New York, and there ordered Samuel Weiner, a poultry marketman and one of the proprietors of the said SS&B Market, to rent and/or buy coops exclusively from the New Jersey Coop Company, and to cease renting and/or buying poultry coops from other sources. Defendant Joseph Weiner, threatened to injure said Samuel Weiner and the property of SS&B Market in the event that Samuel Weiner and his business associates did not comply with said demands. Defendant Joseph Weiner thereafter, to-wit, on or about April 6, 1933, caused the SS&B Market to be wrecked and damaged and thereby caused the proprietors and employes of the SS&B Market and all other persons in the poultry industry in Greater New York to be terrified and put in fear. Defendant Joseph Weiner thereby attempted to create and did create in the minds of Samuel Weiner and his business associates in the SS&B Market a feeling of fear and terror for the purpose of preventing Samuel Weiner and all other persons engaged in the wholesale poultry business in Greater New York from buying, selling or distributing live poultry in a free, open and competitive market, in violation of paragraph 8-b of said decree.

Paragraph 6. During the period from December, 1932, to and including April, 1933, defendant Joseph Weiner used his position and office as an official delegate and business representative of Local 440 of the Official Orthodox Slaughterers of America, Inc., for the purpose of coercing Samuel Weiner and other marketmen to buy their poultry and other commodities necessary to the poultry business from particular sellers in the manner described in paragraph 6 herein-

above, in violation of paragraph 8-l of said decree. During or about the month of November, 1932, defendant Joseph Weiner caused, coerced and compelled the SS&B Market to employ laborers in excess of their reasonable requirements, upon discovering that the said SS&B Market was obtaining poultry coops which are used in transporting poultry to the wholesale markets, from sources other than the New Jersey Coop Company; and said Joseph Weiner thereby violated paragraph 8-g and paragraph 8-l of said decree.